REMARKS

The Declaration has been objected to as being defective due to a lack of title. Attached is a supplemental Declaration including the title. Accordingly, the objection of the Declaration is moot.

Paragraph 4 of the Office Action indicates that claims 1-7 have been rejected under 35 U.S.C. § 103 as being obvious over Fiocca in view of Finola. In a telephone call with the Examiner, it was clarified that this rejection should apply to all of the claims 1-20. Applicant respectfully traverses the rejection of all of the claims, and requests reconsideration thereof.

Independent claim 1 requires "spaced apart tines having lower ends in a common horizontal plane". The Fiocca tines 34, 36 do not meet this limitation, since the tines 34, 36 have lower ends which are vertically offset with respect to one another, as seen in Figure 3. While the Finola patent shows two sets of tines with the lower ends in a common horizontal plane, there is no explanation in the Office Action as to any motivation to combine this teaching of Finola with Fiocca.

Claim 1 further provides that the pairs of tines received plates therebetween. The Fiocca rack 20 does not receive plates between the tines 34, 36. Rather, the pairs of tines 34, 36 of Fiocca are on the upper rack 20, as seen in Figures 1 and 2, while the plates are set in the lower rack 16, as seen in Figure 1. The horizontal wires 39 on the tines 36 preclude plates from being placed between the tines of the pairs 34, 36. While Finola may be able to set plates between the pairs of tines, there is no motivation to substitute the Finola sets of tines for the Fiocca sets of tines, since Fiocca contemplates placing plates in a different rack unrelated to the rack 20 with the tines 34, 36.

Independent claim 8 is similar to claim 1 regarding the tines and plates, and particularly, the tines are free from obstruction between the upper and lower ends so as to angle the plates to fit in a reduced height washing compartment. The tines 34, 36 in the upper rack 20 of Fiocca are not intended to receive plates, as the plates are in the lower rack 16. There is no indication in either Fiocca or Finola that there are problems with plates being in the lower rack, as shown in Fiocca. Thus, there is no reason to modify tines 34, 36 in upper rack of Fiocca.

Independent claim 15 also provides for first and second sets of tines with upper and lower tine ends, and being free from obstruction between the upper and lower ends so as to angle tall objects to fit within a reduced height washing compartment. As discussed above with respect to claims 1 and 8, there is no reason to modify the tines 34, 36 of Fiocca, since they are not intended to be used with tall objects, such as plates, which need to be angled between the sets of tines so as to fit into a reduced space. Rather, tall objects are to be placed in the lower rack 16 of Fiocca.

As the Federal Circuit has expounded, "It is not obvious to modify a prior art device in a manner inconsistent with the prior art reference." In re Gorden, 733 F.2d 900, 902 (Fed. Cir. 1984). To modify Fiocca as suggested by the Examiner would be contrary to the teachings of Fiocca, which teaches that the tines 36 are used to maintain glasses in an upright position in the upper rack, rather than being used in conjunction with the tines 34 to receive plates or tall objects therebetween.

As the Federal Circuit has further explained, "It is wrong to use the patent in suit as a guide through the maze of prior art references, combining the right references in the right way so as to achieve the result of the claims in suit." Orthopedic Equipment Co. v. U.S., 217 U.S.P.Q. 193, 199, 702 F.2d 1005, 1012 (Fed. Cir. 1983). Obviousness cannot be established merely by reciting references describing various aspects of the Applicant's invention, unless there is also

evidence of a motivating force to impel the person skilled in the art to do what the Applicant has done. Ex parte Levengood, 28 U.S.P.Q.2d 1300, 1302 (BPAI 1993). Here, the alleged motivation cited at the end of paragraph 4 of the Office Action is "to enable items such as plates to be retained between adjacent pairs of tines." However, simply placing plates between pairs of tines is well known in the art and is thus an insufficient basis for which to combine Fiocca and Finola. "Citing references which merely indicate that isolated elements and/or features recited in claims are known is not sufficient basis for concluding that combination of claimed elements would have been obvious." Ex parte Hiyamizu, 10 U.S.P.Q.2d 1393, 1394 (AI 1988).

The Federal Circuit has also explained that there must be "some objective teaching" to the combination. In re Fitch, 972 F.2d 1260, 1265 (Fed. Cir. 1992). As further explained in In re Dembiczak, 175 F3d 1994, 1999 (Fed. Cir. 1999), this showing must be "clear and particular". Here, the Examiner has provided no clear and particular objective teaching leading to the combination of Fiocca and Finola.

Therefore, the § 103 obviousness rejections should be withdrawn.

For purposes of 37 C.F.R. § 1.116, this amendment is being presented after the Final Office Action, without any changes to the claims, to explain the deficiencies of the cited references, and the combination thereof.

Accordingly, Applicant respectfully requests that the present Amendment be entered and that a Notice of Allowance be issued.

No fees or extensions of time are believed to be due in connection with this amendment; however, consider this a request for any extension inadvertently omitted, and charge any additional fees to Deposit Account No. 26-0084.

Reconsideration and allowance is respectfully requested.

Respectfully submitted,

Kirk M. Hartung, Reg. No. 31,021
McKEE, VOORHEES & SEASE, P.L.C.
801 Grand Avenue, Suite 3200
Des Moines, Iowa 50309-2721
Phone No: (515) 288-3667
Fax No: (515) 288-1338
CUSTOMER NO: 27139

Attorneys of Record

- pw -